FICTIONAL ELEMENTS IN TREATY INTERPRETATION — A STUDY IN THE INTERNATIONAL JUDICIAL PROCESS

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1. THE CHALLENGE TO THE TRADITIONAL CANONS.

The rules of construction, it has been said, are unfortunately so abundant that "a mere application of one, or a shrewd combination of two of them, may yield almost whatever conclusion the interpreter desires."1 So conversely the learned Reporters and Advisors of the Harvard Research Draft on Treaties2 observed on the illusory nature of the assumption that the process of interpretation is the mechanical one of drawing inevitable meaning from words, or discovering some pre-existing specific intention of the parties with respect to every situation arising. The only guidepost they felt able to give, therefore, in Article 19 of their Draft, was that interpretation should be "in the light of the general purpose" the treaty is intended to serve, and that there should be considered in connection therewith the historical background of the treaty, travaux preparatoires, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevail-

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1 T.-C. Yu, The Interpretation of Treaties (1927) at 72; Y.-T. Chang, The Interpretation of Treaties by Judicial Tribunals (1933). Cf Professor Lauterpacht’s comment on the classical treatment by Vattel (Le Droit des Gens (1756) bk.i, c.xviii): “It is doubtful whether any party to a dispute involving the interpretation of a treaty can fail to derive some advantage from the rich choice of weapons in Vattel’s armoury of rules of interpretation”. (“Restrictive Interpretation and the Principles of Effectiveness . . .” (1949) 26 B.Y.B. of Int.L. 48.)

As to the analogy with the principles of interpretation of private law contracts and statutes, see H. Lauterpacht, Private Law Sources and Analogies of International Law (1927) at 178ff. As to the more specific analogy between multilateral law-making treaties and municipal statutes, see Q. Wright, “The Interpretation of Multilateral Treaties” (1929) 23 A.J.I.L. 94-107, esp. 102-05 as to use of travaux préparatoires. Cf. on this latter point, A. P. Fachiri, “Interpretation of Treaties” (1929) 23 A.J.I.L. 745-752, and the literature cited infra p. 350-51.

2 (1935) 27 A.J.I.L. Suppl. 937-977, esp. 946-47, hereafter cited as “Harvard Research. Treaties”. “It is precisely because the words used in an instrument rarely have exact and single meanings; and because all possible situations which may arise under it cannot be, or at least are not, foreseen and expressly provided for by the parties at the time of its drafting, that the necessity of interpretation occurs. In most instances, therefore, interpretation involves giving a meaning to a text . . . No canons of interpretation can be of absolute and universal utility in performing such a task, and it seems desirable that any idea that they can be should be dispelled.” (Id. at 947.)
ing at the time interpretation is made.

The canons of interpretation impugned by such scepticism as anything but the most rebuttable of presumptions in particular context,⁸ remain sanctified nevertheless by a vast body of doctrine, and by innumerable apparent applications⁴ by tribunals. They maintain their hold even in the modern literature, expressions of doubt being usually followed by an account of the canons as if the doubts scarcely existed.⁵

Twenty years after the notable work of the Harvard Research in International Law the mystery of the canons remains as deep as ever. In 1950 the Institute of International Law, with Professor Lauterpacht as Rapporteur, addressed itself to the matter. If any single conclusion emerges from this discussion, engaged in by authorities who included M. Salvioli, Sir Arnold McNair and Sir Eric Beckett, and Professor Lauterpacht, it is that all the main points challenged a generation before, still remain and still continue to be challenged, today. The primacy of the canon sanctifying the parties’ intention was denied as well as asserted.⁶ The primacy of the “objective” expression (or “plain meaning”) was asserted and denied, with a vehemence no less great.⁷ And despite the earnest and learned labours of two sessions of the Institute, its Members finally desisted from the effort to reach an agreed formulation of the canons of interpretation.⁷⁶

The ostensible policy behind loyalty to the canons is that even when, and indeed especially when, interpretation cannot proceed on any actual intention of the parties, an international court must have principles of interpretation as a check on caprice and subjectivity.⁸ It is by no means always clear, when this reason is given, whether it means that the principles of interpretation (a) do in

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² Cf. L. Ehrlich, “Interprétation des Traités” (1928) 24 Hague Recueil 5, at 78f., who, however, qualifies this insofar as he includes pacta sunt servanda and the principle of good faith among the canons of interpretation which are not mere presumptions.

⁴ The most sophisticated treatment on the orthodox level is in L. Ehrlich, article cited supra n.3, at 5ff. Cf. as to interpretation generally, F. Schreier, Die Interpretation der Gesetze und Rechtsgeschäfte (1927) esp. at 26-42, 47ff., 58ff. The most systematic critiques of the orthodox approach are in the Harvard Research, Treaties, cited supra n.2, at 957-977; and in Y.-T. Chou, and T.-C. Yu, op.cit. supra n.1.

Even considering its limited purpose as an exposition of British Foreign Office practice, A. D. McNair, Law of Treaties (1938) 184-270, accepts the orthodox formulae with inadequate questionings.

Most of the traditional canons have, for example, been cited with apparent approval by the International Court of Justice and its predecessor. See the account of the text books on the point in H. Lauterpacht, article cited supra n.1, at 48-50. A main textbook (as distinct from monograph) treatment which dispenses with the traditional canons is 2 C. C. Hyde, International Law . . . (2 ed. 1947) 1468ff., but that the contradictory assumptions may be found even in Professor Hyde’s position is well illustrated by contrasting his article “The Interpretation of Treaties . . .” (1930) 24 A.J.I.L. 1-19, with his “Judge Anzilotti on the Interpretation of Treaties” (1933) 27 A.J.I.L. 502-506. See also for the continued sanctification of the canons in recent works, A. von Verdross, Voelkerrecht (1950) 136-38, contrasting it with his very acute critical observations on this traditional approach in “Die Wertgrundlagen des Voelkerrechts” (1953) 4 Archiv des Voelkerrechts 129, esp. 131-32.

⁶ See esp. the contributions of G. Salvioli and Sir Eric Beckett in 43 Annaire de l’Institut de Droit International (hereinafter cited as “Annaire”).

See e.g. the interchange between Professor Lauterpacht and Sir Eric Beckett cited infra pp. 349-51. This particular conflict, of course, extends to the interpretation of legislation generally. Thus while Professor Lauterpacht would subordinate to the legislator’s intention all other means and canons of interpretation, U. Klug (Juristische Logik (1951) 143) would apparently make the plain meaning canon (“objective” interpretation) primary, regarding the resort to the will of the legislator (“subjective” interpretation) as auxiliary only.

⁸ See (1952) 44 Annaire, t.lii, esp. 360, 406, where at the end of prolonged discussions the President asked whether Professor Lauterpacht as Rapporteur desired that his draft resolution be put to the vote. The Rapporteur indicated that in the state of all the contradictory opinions which had been disclosed, he prefers that the Institute do not take a decision by vote on a text which the Commission will perhaps by time and reflection he brought to change”.

⁹ See e.g. Sir Eric Beckett in (1950) 43 Annaire, 435-36.
fact give objectivity to the Court’s conclusions, or (b) merely free the Court (in Sir Eric Beckett’s words) “from the suspicion of deciding cases on subjective or arbitrary grounds.” Insofar as the former as well as the latter effects (i.e. the achievement of actual as well as apparent objectivity) are claimed, the present article seeks to make certain qualification.

The need for such qualifications is, indeed, left open by Sir Eric Beckett’s recent approach to this matter. For he has formulated as the central problems of the law of interpretation those “of defining the application” of each canon of interpretation, of “arranging them in hierarchical order”, of fixing “the type of case to which they are respectively applicable,” and of studying “to what extent they are mere presumptions, easily or with greater difficulty rebuttable.”

Understood in this light, Sir Eric’s position would appear to be that for the canons to provide an actual objective basis of decision it would have to be assumed that the application of each canon is defined, that a hierarchical order is fixed, that the type of case to which each is applicable is ascertained, and that, insofar as the canons are mere presumptions, the factors which may rebut them can be objectively determined in each case. It will have to be pointed out that these assumptions cannot all be correctly made in the present state of development of international law.

Many factors have concurred to preserve the confusion in this field. One of them is the multiplicity of meanings which the term “interpretation” itself conceals. Another arises from problems of semantics and from the frequent failure of lawyers to grasp the meaning of meaning itself. Still another is the limited role of third party judgment in inter-State disputes, even today, and even on questions as clearly “legal” as those of treaty interpretation. For on disputes not submitted to third party judgment each State can remain entrenched on its own interpretation, the concealed indecisiveness of the canons providing an admirable disguise for self-interest.

Finally, though without seeking to be exhaustive, it may be added that a debate in which it is not only an open question whether there is any hierarchy of legal rank as between the several canons, and what that hierarchy would be if it existed, but also in which the very identity of the several canons is far from wholly agreed, could in any case scarcely come to a decisive issue.  

8a Ibid.

9 Id. 440.

10 L. Ehrlich, op.cit. supra n.3, at 53, identifies no less than five. And cf. 1 P. Guggenheim, Lehrbuch des Voelkerrechts (1948) 125.


13 And indeed, as to whether the canons are legal principles at all. See e.g. F. Schreier (op.cit. supra n.4, at iv) who points out that “the principles of interpretation are metaphysical”; contrasting the more common position of L. Ehrlich, op.cit. supra n.3, at 78, that the rules of interpretation are clearly rules of law.

14 See, e.g. I.C.J., Advisory Opinion concerning Interpretation of Peace Treaties with Bulgaria, Hungary and Romania of July 18th, 1950, I.C.J. Reports 1950, 229: “The principle of interpretation expressed in the maxim: Ut res magis valeat quam pereat, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit.” The res here appears to be the policy favouring third party judgment, frustrated by “the letter and spirit” of a Treaty which did not compel the Parties to do what was necessary to constitute the Tribunal.

15 See infra passim for the competition between the intention, effectiveness and plain meaning canons for legal predominance. As to whether there is any hierarchy at all, see G. Salvioni and Sir Eric Beckett in (1950) 43 Annuaire 454, 439. The shadowy lines not only
Insofar as the canons continue to be invoked by State and international organs, they may be argued to be customary rules of international law; and critics who impugn them to be challenging the conventional theory of international law. On a correct analysis, however, this is not really involved. The challenge is not to the concrete interpretations given by such organs, but to the verbal formulae (the canons) accompanying such interpretations. And what the challenge asserts is broadly that the formulae too often do not compel the interpretation; that even when they appear to do so, some competing but equally authoritative canon might, if invoked, have yielded a different interpretation; and that in any case identical interpretations can usually be reached without invoking any set canons at all.

II. UNINTENDED "INTENTIONS" OF THE PARTIES.

In the orthodox approach to the task of interpretation, as Judge McNair has put it, all the rules and maxims "are merely prima facie guides to the intention of the parties, and must always give way to contrary evidence of the intention of the parties in a particular case". Such a master-canon proceeds on two assumptions, both far from self-evidently or invariably correct. One is that the parties have an intention on the point in dispute; another is that, assuming such an intention, it can be ascertained by the forum. Yet even for bilateral or paucilateral treaties these assumptions are hazardous. It is notorious that, even there, the treaty terms may often be intended, not to express the consensus reached, but rather to conceal the failure to reach it. In multilateral instruments, especially political ones, that agreed content expressed by the terms may be far less important than the non-agreed content concealed by them. When a case arises involving the non-agreed content of the treaty, interpretation of the terms, even if purporting to find the intention of the parties, is not in fact doing so. The imputation of intention in such a case is a fiction concealing the true nature of the activity.

Yet the assumption that an intention must always be discoverable and discovered dies hard. Professor Lauterpacht, for example, has recognised five main situations in which the parties may lack a common intention as to matters to which the treaty is to be applied. First, the parties may, acting in good faith, have attached different meanings to the language of the treaty; second, they may do this as a result of the deliberate design of one of the parties; third, the parties may, lacking real consensus, "use an ambiguous or non-committal expression" of their legal hierarchy but of the very identity of the canons, are illustrated in Professor Sibert's recent treatment (2 M. Sibert, Traité de Droit International Public (1951) 319 ff.). While giving the "intention" canon clear primacy, he introduces as ancillary thereto canons such as those of lex specialis, as well as of the "plain meaning". He then places as subsidiary to this first level of canons, the following principles: (1) that extension of treaty provisions may not be presumed; (2) that exceptional provisions cannot be extended; (3) that limitations on rights are to be strictly construed; (4) the maxim contra proferentem.

See the striking example quoted in H. Lauterpacht, article cited, at 50, of Professor Verzijl's formulation as arbitrator of a system of rules of interpretation in the award in the George Pinson Case (Franco-Mexican Mixed Claims Commission, Annual Digest 1927-28, Case No. 292), followed in later years by his conclusion that while in principle such rules are correct, "in concrete application" they often abrogate each other and frequently appear worthless".

The late Professor Hyde ("Interpretation of Treaties by the Permanent Court . . . " (1930) 24 A.J.I.L. 1, 19) referred to the Court's language favouring the plain meaning as "authoritative tokens of a deference for the form of a text which nothing in its judicial experience has thus far served to weaken". Furthermore (as he also pointed out) there have always been more grounds than the application of one particular canon to support the holding in a particular case.

A. D. McNair, op.cit.supra n.4, at 185; cf. supra p. 345. And see ibid. 184-197 for official British statements.
so as to leave the divergence of views to be solved in the future by agreement or otherwise; fourth, the subject-matter in relation to which interpretation of the treaty is now sought may have been simply not present to the minds of the parties; fifth, they may have included in the treaty terms provisions which contradict each other in their application to the instant subject-matter. Yet recognizing all this, he is concerned to insist that the interpreter's task even in such cases is still essentially a search for the parties' "intentions." 

As to the first (the absence (with good faith) of common meaning behind the expression), Professor Lauterpacht sees the task as still that of discovering "the common intention of the treaty taken in its entirety . . ."; as to the second (where one party lacks good faith) it is for the interpreter nevertheless to "assume" the common intention required by good faith; as to the third case (deliberate ambiguity or equivocation covering lack of consensus) the interpreter is still, in view of the postulated "completeness" of conventional as well as customary law, "bound and entitled to assume an effective common intention of the parties and to decide the issue." And, he adds most astonishingly, "that common intention is no mere fiction". And he takes a similar view for the fourth situation, of the pure casus omissus. Even as to the fifth (mutually inconsistent provisions within the same instrument), while he admits that the court must decide which "object of the treaty" and which of its provisions, taking it as a whole, are more "important", he still insists that the court is deciding "on legal as distinguished from political grounds . . .". 

Yet at last the learned writer is constrained to admit that in such cases the court is creating a rule rather than discovering an intention, "imputing rather than discovering a common intention underlying the treaty as a whole".

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17 Substantial variance of intention on a concrete provision, known by the Parties to each other at the moment of signature, is beautifully illustrated by the notorious Art.23(h) of the Hague Convention on Land Warfare, on which see J. Stone, Legal Controls of International Conflict (1954) 443, 559, n.73. This work will be here cited as "Stone, Legal Controls."

18 E.g., the application of the Convention concerning the Employment of Women during the Night to women in supervision or managerial positions, determined by the Court Advisory Opinion in P.C.I.J. Series A/B, No. 50; or the power of the International Labour Organisation to regulate incidentally the personal work of employers, determined in Advisory Opinion, P.C.I.J. Series B, No. 13.

19 For a good modern example cf. the controversies as to the obligation to place mandated territories under United Nations Trusteeship under Art. 77 of the Charter. See the South West Africa Case, I.C.J. Reports, 1950, 148.

20 And therefore not a legislative one. See especially his criticism of the view of M. Planiol et G. Ripert, Traité Pratique de Droit Civil Francais (1931) 514, that this is the nature of the task, involving inter alia a valuation of the parties' interests.

21 The task, he also says, is still to impart an effect to the clauses "by reference to the purpose of the treaty as a whole and to other relevant considerations," having in mind that "interest rei publicae ut sit finis litium". See p. 78.

22 This may arise from many causes of which perhaps the most interesting is the discrepancy between vague political catchcries and precise obligations.

Thus under Article 37 of the Charter the obligation to submit a dispute to the Council is conditioned inter alia on failure to settle the dispute by the means indicated in Art. 33. The means referred to in Art. 33 are negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of the parties' own choice. The problem arose in the Soviet Iranian Case (see U.N.S.C. Off. Rec., First Year, First Series, Third Meeting, Jan. 28, 1946, No. 1, 39-43) whether the parties had failed to settle the dispute within Art. 37 when one of them regarded further negotiation as hopeless and the other as hopeful.

Not only was the expressed intention unclear, but also what "effective common intention" could be implied. On the one hand, it could be said that the party refusing to pursue any of the other peaceful methods should not be allowed by its own recalcitrance to give itself power to invoke the compulsory jurisdiction of the Security Council. On the other hand, it seems equally unreasonable to imply a common intention that a party should be able to block indefinitely the Council's settlement function by continually pretending willingness to negotiate, despite the obvious deadlock which the parties have reached.


24 Cf. also the case of inconsistent language versions — each authoritative.

25 Ibid.
that is, importing into the text "a meaning by reference to the paramount principle of the completeness and the rational development of the law and of the requirements of justice in the light of the purpose of the treaty viewed as a whole". This process, he also admits, uses as its "standards of interpretation" such factors as "considerations of justice, canons of fairness and good faith, and, in proper cases, an equitable reconciliation of the interests at stake".26 And while he is at pains to reject the legislative view of the task of "interpretation" for the pure casus omissus, he is also constrained to admit that the source of judgment there lies in the will and in the interests of the parties "as interpreted by the judge". To add the rider, "by reference to their intention manifested by the treaty as a whole", and to talk of the discovery of the "implied" intention,27 can scarcely conceal (though it undoubtedly obscures) the true nature of this analysis.

Arguments can be made for the indulgence of such fictions, in particular to disarm the still prevalent prejudice against judicial law-making activity. Yet such creative judicial activity is, as many writers (including the present Author) have shown,28 often inescapable. This fact implies judicial responsibility of the court for the rules thus created; a responsibility which will not be consciously assumed until judicial creativeness is recognised as such. To conceal it behind the "assumed" or "implied" or "imputed" intention of the parties is to invite the exercise of the power without the acceptance of the responsibility therefor. There is a danger, in short, of reducing "the intention of the parties" to "a phrase employed . . . to justify conclusions arrived at by some method other than the ascertainment of any actual intention of the parties".29

Significantly enough, eminent British authorities have recently taken diametrically opposed positions on the very elementary question of the supposed primacy of the "intention" canon. Sir Eric Beckett stated emphatically30 in the Institute discussion of 1950 that "the task of the Court is to interpret the treaty and not to ascertain the intention of the parties". Professor Lauterpacht replied, maintaining a position he has long taken,30a that the rules of interpretation have no meaning and might even be harmful unless their object is to interpret the real or presumed intention of the parties.31 No less striking is the fact that even the staunchest protagonists of the primacy of the intention canon are still con-
strained to recognise that even the most elementary requirement concerning this most elementary canon raises controversy. While, for instance, Professor Lauterpacht is sure that "someone's intention" is the test, he regards it as still worthy of discussion whether the "someone" consists of those who negotiate and sign the treaty, or of the ratifying authority. He chooses the former on the basis of "the invariable practice of international tribunals". For this purpose he has to make the rather strained argument that while ratification is decisive as to validity, it is still "essentially formal in its nature and must not be confused with the substantive act of making the treaty". The analytical weakness of this rationalisation is increased when we consider the historical fact that, in modern practice, it is precisely the signature rather than the ratification which is increasingly becoming the formality.

III. INTENTION AND RESORT TO THE TRAVAUX PREPARATOIRES.

The illusory elements which undermine the intention canon are well illustrated by the stark conflict of opinion among distinguished authorities concerning the role of travaux preparatoires in interpretation. The assumption on which Professor Lauterpacht based his report to the Institute of International Law in 1950 is that resort to the travaux preparatoires provides information as to the state of mind of the parties, which in turn enables their intention to be discovered. If, therefore, the travaux are published and accessible, Lauterpacht regards them as a proper source for ascertaining the intention. On this point his Draft Resolution proposes that such resort is a legitimate and desirable means to the ends of establishing the intention of the parties in all cases where, despite the apparent clarity, the meaning of a treaty lends itself to controversy. There is no good reason to exclude the use of travaux preparatoires duly authenticated and published as against

The literal interpretation may, of course, yield only a choice of contradictory alternatives, on which see infra n.51. Such contradictory alternatives arising from literal interpretations are of two types. One is where the contradiction arises from placing a particular provision side by side with others. Another is where the contradictions arise, as Professor Verdross has well observed (A. von Verdross, article cited supra n.5, 131), from the use of words of emotive value-content, such as "democracy", "sovereignty", "human rights", "aggressive" and "defensive", "war", etc. Mere words, he says, are "not capable of grounding any genuine bonds if the values which stand behind the words are not taken into account" (ibid. 132).

For philosophical rejection even of the assumption that law is the expression of anyone's will, see A. Hagerstrom, Inquiries into the Nature of Law and Morals (transl. C. D. Broad) (1933) 17-55, esp. 55. On this view collective organs which determine the contents and validity of international treaties could not, in any case, strictly speaking, possess will or intention, except in a very depersonalised sense.

For this doubt concerning whose intention is decisive, C. Fairman, "The Interpretation of Treaties" (1935) 20 Grotius Soc. Trans. 123, 127. Mr. Fairman adds the point that quite apart from ratification practice the position has altered from the time when treaties were made mainly between personal sovereigns. And see the substantial discussion of the same problem in L. Ehrlich, op.cit. supra n.3, at 54-67.

On this matter Professor Lauterpacht has sought to dismiss as inaccurate the idea that there is a conflict of views between the Continental lawyers favouring their use, and then Anglo-American practice to the contrary. ("Some Observations on Preparatory Work. . ." (1935) 48 Harv.L.Rev. 549, 550.) Whether or not he is correct on that, the supposed disagreement on this point reflects immediately upon the nature of the test of intention.

On a similar basis the Court has assumed the liberty to refer to facts even subsequent to the conclusion of the treaty insofar as these are calculated to throw light on the intention of the Parties at the time of the conclusion of the treaty. See generally P.C.I.J., Series B, No. 12, p.19, and id., Series B, No. 5, p.17.
States who have adhered to the treaty subsequent to signature by the original parties.36b

Yet this view on so elementary a matter was questioned even at that late stage by equally distinguished authorities. Sir Eric Beckett, for instance, thought that Professor Lauterpacht had failed to bring out the importance of "the compromise behind the scenes".37 Furthermore, it was not correct to assume that there was a direct relation between speeches made at conferences and the text of the ultimate instrument.38 Otherwise, he observed, conferences would be even more laborious and lengthy than they are, and it would be almost as difficult to obtain agreement on the minutes of each meeting as it is upon the text of the ultimate instrument.39

Moreover, the former Legal Adviser of the Foreign Office observed, the text of the treaty once in force has a life of its own, which separates it progressively from what was discussed during negotiation. "Everybody was then worrying about the things that did not matter and most of the things that did escaped their attention." In such circumstances, concluded Sir Eric, "to hark back to the travaux préparatoires for the purposes of interpretation may operate like bringing a dead hand from the grave or subjecting a grown man to the paternal injunctions of his boyhood".40

What is of interest for the present is the persistent divergence of standpoint on a matter which, by its nature, must be of potential and possibly decisive importance in the vast majority of cases of disputed interpretation. It is to be added moreover that, whichever of the above views is correct the judicial task implied is always creative in the sense that it allows a range of choice. If Professor Lauterpacht is right, then Sir Arnold McNair's point seems unanswerable that resort to the travaux introduces elements of uncertainty into the operative text of the instrument. On the other hand, if Sir Eric Beckett is correct, it becomes a matter for individualised appreciation in each case whether any such inferences from the travaux préparatoires are there warranted as will justify reference to them. Insofar as the travaux would, if referred to, vary the meaning found in the text, then the judicial choice whether to refer to them implies that the court has a choice of meanings within the leeway left by the relevant canons of interpretation.

36b The Permanent Court refrained from referring to travaux préparatoires, where the text was "sufficiently clear in itself" (see inter alia P.C.I.J., Series A, No. 10, p. 16, and id., Series A/B No. 50, p.378); where the travaux were "confidential and have not been placed before the Court by, or with the consent of, the competent authority" (see P.C.I.J., Series B, No. 14, p.32); and where some of the litigating Parties had not taken part in the work of the conference which prepared the treaty in question (see id., Series A, No. 23, p.42).

37 Annuaire 443. "Often", he says, "a person reading the travaux préparatoires will come across something which, if he studies them in detail, he finds completely baffling. Something appears to have happened but there is no record of it at all . . . . What, of course, has happened is that as the conference was making heavy weather, some private meeting was called."

38 450-52.) For that purpose he enumerated the following guides: (a) Travaux préparatoires are never admissible where the natural meaning not absurd. (b) Travaux préparatoires inadmissible insofar as there is evidence of the parties' consent to the meaning they embody. (c) In multilateral treaties, travaux préparatoires are usable against States later adhering only as follows: (i) If the travaux préparatoires have been published and are generally accessible (e.g. of the San Francisco Conference) they are usable against all States later adhering. (ii) If the travaux préparatoires, though deposited with a government, are not published, it may be argued either that they can be used against a later adherent, since he comes to the treaty at his own risk, or contrarily that the later adherent, being a mere third party, is not bound by the travaux préparatoires. While Professor Lauterpacht would take a liberal view of the use of travaux prépara-
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Nor does it wholly remove such difficulties to call in aid of "the intention" of the parties, the notion of "the purpose" which the treaty is to serve, or of giving the treaty the maximum effectiveness, of what has been termed "functional interpretation". Unless "purpose," or "function," or "effectiveness" be thought of as a perceptible attribute of an instrument, like its date, the inquiry is still thrown back upon some attitude of parties or tribunal concerning what the treaty "is for".

Sometimes, of course, both the "intention" principle and that of "effectiveness" will yield adequate guidance, where the text is difficult. A good instance arises from the strange fact that Chapter VI of the United Nations Charter, though devoted to the pacific settlement of international disputes, nevertheless appears to confer no power on the Security Council to recommend actual terms of settlement of the merits of disputes. Yet it can scarcely be doubted that both the test of implied intention and the principle of effectiveness, warrant such an interpretation of Article 37 as will give the Council power to make recommendations. Unless this is done, the absurdity is reached that, even when all the conditions for the competence of the Council are fulfilled, it still could not perform the central task of the function for which Chapter VI seems designed to provide.

Yet such guidance does not always proceed from these canons. The United Nations Charter, for example, contains within itself provisions such as those concerning the peace enforcement powers of the Security Council, whose "purpose" or "function" is (looking at them alone) clearly to subordinate certain basic customary State liberties to collective authority. It also contains provisions, however, for instance as to the Great Power veto, as to self-defence, as to action against ex-enemy States, and as to domestic matters, whose "purpose" or "function" is equally clearly to assure Members of continued enjoyment of the anarchic prerogatives of traditional sovereignty.

Which of these contradictory motifs is the purpose, the function of the Charter? It is easy to prefer the more "progressive" motif, and reduce inconsistent provisions to the role of an exception to be strictly construed. But this, unless well based on the actual attitude of the Parties, is a mere personal preference of the interpreter.
Yet if reference is made to their attitude, it becomes immediately apparent that though some smaller Powers may have accepted the Charter as subordinating State sovereignty to collective peace enforcement, others (certainly including the Soviet Union) conceived of the Charter as guaranteeing their sovereign prerogatives; and still others (including probably the United States) took at least an ambiguous attitude as to the primacy of the contradictory motifs. Such questions, therefore, as whether the Soviet use of the veto, or the North Atlantic Treaty, is a violation of the "purpose" or the "function" of the Charter, can each of them be answered either way according to which of the contradictory motifs common to the parties' attitudes is selected.

In the light of this analysis (which events have confirmed), it is striking to find a realistic writer asserting, as if by way of solution of the main problems of interpretation of the Charter, that the task is to endow it "with the maximum of effect on the basis of the actual text", and of other materials elucidating the draftsmen's intentions. Would it, then, it may be asked, maximise "the effect" of the Charter to restrict the power of the Security Council by holding that absence of a Permanent Member makes decisions of substance legally impossible? Or contrarily to restrict sovereign prerogatives of States by holding that absence is equivalent to abstention, and that mere abstention does not imply non-concurrence in the decision? The present analysis shows that either course would "maximise the effect" of the Charter, according to which was chosen as "the effect"; and that the contradictory versions compete to govern the matter. The principle of maximum effectiveness in itself gives no decisive guidance in the choice.

V. COMPETITION BETWEEN THE DOCTRINES OF "EFFECTIVENESS" AND OF "RESTRICTIVE INTERPRETATION".

Indeed, even if the "effect" of a treaty were a known entity, its claims to paramountcy would still be confronted by an older and still cherished canon tending to opposite results. This is that treaty obligations must be construed restrictively, in favour of sovereignty; so that provisions which might or might not impose obligations on States, or which might impose greater or lesser obligations, shall be construed so as to impose no obligation, or the lesser obligation, as the case may be. This latter principle will obviously tend to

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49 "Pollux" in article cited supra n.45, at 70. There is a similar fallacious assumption that "the purposes" of the Charter are something given and self-consistent, in C. Eagleton, "The United Nations: A Legal Order?" in Lipsky, Law and Politics.
50 For substantive discussion of these problems see Stone, Legal Contrds, 200-242.
51 It is unnecessary, therefore, to go as far as H. J. Morgenthau, "Political Limitations of the United Nations" in Lipsky, Law and Politics 143-152, who suggests that the Charter must be interpreted in the context of the political environment, rather than according to its internal provisions. For, in the present view, the ambiguity of the purposes of the Charter emerges also from the internal provisions themselves.
52 The inconclusiveness as between the competing purposes manifest in the provisions of the Charter is, of course, more than matched by the competing meanings which offer on a literal or casuistic interpretation of the Charter. Cf. on this point, A. von Verdross, article cited supra n.5, at 131. Professor Kelsen's Law of the United Nations (1950) is, of course, a veritable museum of the contradictions which can be based on literal interpretations of the actual words of the Charter.
53 On the questions, somewhat too speculative and too little determinative of present issues for study here, of the relation of other forms of "restrictive" interpretation, e.g., the maxim that texts are to be construed contra proferentem, and that in dubio mitius, see the discussion and the authorities collected in H. Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness . . ." (1949) 26 B.Y.B. of Int. L. 48, esp. 56-61.
conflict with that of maximising the treaty's effect whenever (as is usually the case) such "effect" depends on the creation of obligations for States. The interpreter, therefore, usually has available competing canons on the undisputed authority of which he can impose or refuse to impose obligations in a doubtful case. And since no canon dictates the choice between the conflicting canons, the choice may endorse rather than dictate the conclusion reached.

In the final analysis, indeed, the supposed canon requiring the interpretation least restrictive of the obligations of the parties may yield only self-contradiction from within. For insofar as concerns a Party's duties in the strict sense, those are correlative to the rights of some other State Party. Insofar as an interpretation restricts the duties of the one, it also restricts the rights of the other. Any policy favouring the restriction of the duties of one State must thus inevitably also restrict the rights of some other State. A good example is to be found in the invocation of this canon by Counsel for the United Kingdom in relation to the Norwegian Claims adjudicated in the Anglo-Norwegian Fisheries Case. There, as well as in connection with current disputes concerning the continental shelf, the canon is applied, indeed, not to the interpretation of a treaty text but to the eking out of a customary rule. The question of principle is, however, identical, and in both examples it is obvious that to apply the restrictive rule in favour of the State basing itself upon the freedom of the seas, not only keeps down the obligations of these States, but also keeps down the rights of the littoral States. The keeping down of the rights of the littoral States could also be understood as an imposition on those States of legal burdens, i.e. "duties", or (in the Hohfeldian sense) of "disabilities" of action beyond the accepted margin.

This position is not affected by the tendency of modern international tribunals, while preserving in terms the canon of restrictive interpretation in

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83 Cf. H. Lauterpacht, article cited supra n.52, at 67: "These two principles — that of restrictive interpretation and that of effectiveness — are mutually incompatible. The more there is of one the less there is of the other". Cf. that writer's Report to the Institute giving priority to the intention canon (1950) 43 Annuaire 366, 402, 407, 420. The matter is a fortiori when the "effectiveness" principle is given a roseate version requiring a "liberal generous spirit" towards "the intent of the negotiators". See e.g. F. Marshall Brown, "The Interpretation of the General Pact for Renunciation of War" (1929) 29 A.J.I.L. 374-79. And see also E. Fairman, op.cit. supra n.26, at 123, 133.

85 On the rather less noted contradiction between the effectiveness canon and the argument ex contrario see G. Salvioni in (1950) 43 Annuaire, 453-55.

86 See e.g. Sir E. Beckett's argument I.C.J. Pleading, iv, 43.

87 The canon under discussion may, indeed, be found in three main types of formulation, none of which seems to have exclusive authority.

One is that restrictions on the sovereignty of States will not be presumed. (See the Lotus Case, Judgment of 7th September, 1927, P.C.I.J. Series A, No. 10, p.18: "Restrictions upon the independence of States cannot . . . be presumed." See also Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (1953) 306.)

A second is that treaties imposing obligations on States are to be restrictively construed. (See the Judgments in the Wimbledon Case, P.C.I.J. Series A, No. 1, p.24; and The Free Zones Case, P.C.I.J. Series A/B No. 46, p. 167: "... in case of doubt a limitation of sovereignty must be construed restrictively . . .". See also L. Ehrlich, "L'Interprétation des Traités" (1928) 24 Hague Recueil 5-143, at 45 and 90.)


favour of State sovereignty, to treat it as applicable only when other aids to interpretation have failed. For it is simply not sustainable that any such super-canon of choice has been established by the practice or consent of States.

VI. THE PROBLEM OF THE "PLAIN" MEANING.

Such a "super-canon" is sometimes thought to be established in the different rule that the terms of a treaty are to be understood in their "plain", "natural", "grammatical", "logical" or "ordinary" sense. Illusory elements still enter here, however, though at a different point. For the question whether a particular sense is "plain" is often the very heart of the task of interpretation. When it is, the resort to the canon only veils the process whereby the interpreter "reaches a certain conclusion which inclines him to regard a particular meaning as the natural and plain meaning of a given word". The main difficulty with the canon as to "plain" and similar meanings lies deep in the problems of semantics. Too often those who apply it assume that words have a meaning in themselves, that this autonomous meaning is the "plain" or "ordinary" or "natural" meaning, and that only when this meaning is displaced, for instance by the absurdity of the result it gives, does the question arise in what sense the

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56 See e.g. in the Permanent Court of International Justice, the Free Zone Case, P.C.I.J. Series A/B, No. 46, at 138; and the Phosphates Case, P.C.I.J. Series A/B, No. 74, at 23.

57 See the municipal and international cases collected by H. Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness . . ." (1949) 26 B.Y.B. of Int. L. 48, at 61-67, with the analysis of which on the instant point the Author agrees.

So that even in cases where it found no plain meaning, it has chosen to follow the canon of effectiveness rather than that of restrictive interpretation in favour of State sovereignty. See e.g., the holdings of the Permanent Court in favour of its own competence as against the sovereignty of the disputants in the German Interests in the Upper Silesia Case, P.C.I.J. Series A, No. 6, at 14, Series A, No. 9 at 23, and in the Corfu Channel Case, I.C.J. Reports 1949 at 26; as well as others in favour of the competence of certain international organs in the German Settlers Case, P.C.I.J. Series B, No. 6, at 26; in the Polish Nationality Case, Series B, No. 7 at 7, the Minority Schools in Albania Case, Series A/B, No. 64, at 182, and in certain Opinions on the Competence of the International Labour Organisation, Series B, No. 2 and No. 13, discussed in H. Lauterpacht, loc. cit. 54, 65-75. Cf. C. C. Hyde, article cited supra n. 15, at 18-19, pointing out that even in default of guidance from the plain meaning the Court has still preferred the implied intention canon to the "restrictive" one, only admitting the latter when the intention remains finally doubtful.

58 While there are judicial dicta which appear to support it, they go no further than to make the "intention" or "the plain meaning" decisive, if there is no doubt as to these. See e.g. P.C.I.J., Series A, No. 23, p.26, where the Court said that "it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that that interpretation should be adopted which is most favourable to the freedom of States"; id., Series A, No. 24, p.12 and Series A/B, No. 46, p.167, where the Court said that limitations on sovereignty must be construed restrictively "in case of doubt"; and id., Series A, No. 1, p.244f., where the Court, after pointing out that "in case of doubt" a provision limiting a State's exercise of sovereign rights must be given a restrictive interpretation, held that it nevertheless felt obliged to stop "at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted."

59 Sir Eric Beckett makes the acute practical point that States sometimes litigate a provision even when it is (as it were) plainly "plain", because they cannot for political reasons give way except on the basis of a legal decision. This is not, however, the usual situation in which the plain meaning canon comes into litigation.

60 "Pohlux", article cited supra n.45 at 67, and see ibid. for citations to the use of these or analogous terms by the Permanent Court of International Justice. Consequentially, as Professor Lauterpacht (article cited supra n.47 at 51) has observed, "to say that the rule as to restrictive interpretation or preparatory work may be relied upon only when the treaty is not clear is to lay down a condition the actual application of which is the result of the process of interpretation and not its starting point".

The present writer has shown how on the analogous canon in the interpretation of statutes, British courts, though professing to exclude reference to "policy" when the meaning of the words is "plain", in fact resort to policy in determining whether the meaning is plain. See Stone, Provincial, 195-95. The entire analysis of the judicial process in municipal courts in c.7 of that work is relevant in important respects to the present article.

6a With respect, it seems rather a play on words for Professor Lauterpacht to reduce current controversies to the mere superficial level of a conflict between "literal" and
parties used them. Yet, in final analysis, the "plain" (or "ordinary" or "natural") meaning has no other claim to primacy than that which arises from the fact that words are ordinarily used in the sense in which they are ordinarily used — that the generally used standard of meaning is the standard of meaning generally used. But the particular parties to a particular treaty may not use the general standard of meaning, but some regional or technical standard, or some standard peculiar even to them alone; and, if they do, it is that standard which must be applied, notwithstanding the canon of the "plain" meaning. It is only insofar as no other common intention is to be found, and yet the words do have some relevant meaning by the ordinary standard, that a tribunal can fix the parties with that "ordinary" meaning. When this happens, moreover, it may be for lack of any better course, rather than a result of the canon of the "plain" meaning. Conversely, of course, the canon can be of no aid in the case of words which have more than one ordinary meaning.

"liberal" interpretation. See his "... Observations on Preparatory Work in the Interpretation of Treaties" (1935) 48 Harv. L. Rev. 549-591, at 551. He there observes that "the immutable meaning of the word, given by the general, as distinguished from the individual standard, represents the requirement of confidence and certainty; the realisation of the intention...represents the element of equity and justice." Quite apart from cases to which the restrictive canon of interpretation is applied, this overlooks the fact that interpretation based on extrinsic evidence may still be quite illiberal and deny equity and justice. In particular, the assumption that the intention must always lead to equity and justice ignores the legal validity of coerced transactions in international law.

 Cf. Professor Lauterpacht's view, article cited supra n.58a, at 549, 573 that the supposed primacy of the "plain meaning" cannon means only that the plain meaning is a starting-point raising a presumption which may be rebutted.

It is to miss this main point to suggest, as does Sir A. D. McNair (1950) 43 Annuaire at 540 et seq., the real problem will be eased by substituting the phrases "natural meaning" and "ordinary meaning" for the terms "clear meaning" and "evident meaning".

The late Professor Hyde once observed that "a grim fact never to be lost sight of in the interpretation of treaties is that the contracting parties are always free to use words in any sense they see fit, and do not hesitate to exercise that right as occasion may require". (See C. C. Hyde, "Judge Anzilotti on the Interpretation of Treaties" (1933) 27 Am.J.Int'l.L. 504. Cf. among many similar views, Professor Lauterpacht's (Some Observations on Preparatory Work in the Interpretation of Treaties) (1935) 48 Harv.L.Rev. 549 at 571) that "nothing is absolutely clear in itself" and that "no clarity is so absolute as not to admit of a proof to the contrary"; and H. Kelsen, op.cit. supra n.51, at xiv: Harvard Research, Treaties, 938. And cf. the main thesis of P. Marshall Brown, article cited supra n.53, who however as, indeed, Professor Lauterpacht also does, tends to substitute for credulity as to the plain meaning, an undue credulity as to the infallibility of the "intention" or "spirit" and of the extraneous evidence guiding thereto.

In an early statement in his Law of Treaties (1938) Professor McNair took the position which he thought also would be the modern position of the British Government. This was that all the canons, including the "plain meaning" canon are "merely prima facie guides to the intention of the parties, and must always give way to contrary evidence of the intention of the parties in the particular case". (P. 185.) But see supra p. 345.

F. Schreier's point (op. cit. supra n.4 at 65) that the standard as understood by the persons to whom the law is addressed may be decisive can scarcely have much application to international treaties. The alternative is nevertheless of general theoretical importance. Cf. Professor Glanville Williams, "Language and the Law — IV" (1945) 61 L.Q.R. 381, 392-94, distinguishing "intended", "comprehended" and "ordinary" meanings as main alternatives, each of which may be relevant to the legal problem at hand.

The late Professor Hyde's article cited supra n.57, is directed rather to showing that the canon of restrictive interpretation will not operate when the canons of plain meaning and intention provide guidance, than to the present point as to the relation between the plain meaning and the intention. As to the former point see supra p. 55, n. 57.

See e.g. the discussion of the terms "call upon" and "recommendation" in the United Nations Charter in Stone, Legal Controls, at 220.

The illusory nature of the certainty aimed at by the plain meaning canon is accentuated by the further fact that "plain" is itself a category with competing versions. As A. D. McNair long ago observed (Law of Treaties (1938) 185) "plain" may mean "plain" absolutely and in general, and in that sense the canon as applied to a particular provision must only be a prima facie rule subject to rebuttal. Another version is that "plain" means "plain" relatively to the circumstances in which the treaty was made, or better, to the circumstances in which it is now to be applied. Only in the latter sense of "plain" could the canon conceivably have primacy.
VII. JOINT EFFECT OF "THE PLAIN MEANING" AND "THE CONTEXT".63

But even where the meaning of "the plain meaning" is itself plain, the operation of the canon of the plain meaning may still not be quite what it seems. For that canon is rarely exclusively relied on to interpret a concrete text. It is another canon almost as well sanctified, and of equal ambit, that even "plain" words must be read in their context. The canon of the context complements that of the plain meaning; it also corrects the erroneous versions of it. For if the "plain" meaning of words were really their meaning in themselves, the context would be irrelevant. To let in the context is really to inquire whether in the concrete case the Parties used words according to their "ordinary" or some other standard of meaning.64 Where the "ordinary" and contextual meanings conflict, neither canon, however respectfully saluted, can dictate the result.65 Or, we might better say, neither the ordinary meaning alone nor the contextual meaning alone, but the ordinary meaning in the context, is the starting point of interpretation.65a

The main analysis was made with brilliant clarity by Judge Anzilotti in an early case before the Permanent Court of International Justice.66 . . . I do not see how it is possible to say that an article of a convention is clear until the subject and aim of the convention have been ascertained, for the article only assumes its true import in this convention and in relation thereto. Only when it is known what the contracting parties intend to do and the aim they had in view is it possible to say either that the natural meaning of terms used in a particular article corresponds with the real intention of the parties, or that the natural meaning of the terms used falls short of or goes further than such intention.67

VIII. MULTIPLE VERSIONS AND INDETERMINACY OF "THE CONTEXT" ITSELF.

Even if the canon of the context were the only canon applicable, interpretation would still be a process whose whole nature was not revealed by the

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64 Though, admittedly, this is usually stated in other forms, for instance, by inquiring whether the ordinary meaning yields a "reasonable" result, or whether it leads to "absurdity" or internal inconsistency, or the like. The very terms "reasonable" and "absurd" imply a reference to some context. Even, for example, if the words "sovereign" and "equality" each had a "plain" meaning, the two words "sovereign equality" as used in Art. 2, para. 1 of the Charter could not in the context be read as a mere combination of these "plain" meanings.
65 See the Opinion of Judge Anzilotti, P.C.I.J., Series A/B No. 50, at 383.
65a Even writers like the late Professor Hyde, who stress the paramountcy of the plain meaning, are ready to admit that to say that a provision has a "plain" meaning within the canon, presupposes that the provision has been read in its context, including therein the general aim or purpose of the whole treaty as manifest in such evidence of the parties' intention as can be found. (See e.g. C. C. Hyde, "Judge Anzilotti on the Interpretation of Treaties" (1933) 27 A.J.I.L. 502ff.)
67 Cf. the acute comment of the late Professor C. C. Hyde, article cited supra n.65a, at 503: . . . linguistic clearness is not necessarily identical with clearness of design on the part of the contracting parties, and . . . as the function of the words of a treaty is to mirror that design, and as symbols thereof to guide the interpreter to a correct understanding of the instrument that registers accord, their value for such purpose, or to express it more simply, the clearness of their guidance, must depend upon and even await explanations that may come from many places. Through them is revealed the connection between the words employed and the ends sought to be accomplished; the revelation of that association gives to the words their real significance and makes their guidance comprehensible. The interpreter must therefore, find out what that connection is . . . Nothing that is explanatory can
canon. For the canon of the context is itself a precept of numerous versions. It may require words to be read in the whole sentence, or in the whole article, or with some other part of the treaty, or with the whole of the treaty, in the light of the "role", "scope", "tenor" or "spirit" of the provisions as emerging from the entire framework or scheme, or general plan, or purpose of the treaty. In a particular case different and conflicting results may be indicated according to which of these different versions of "the context" is used. Insofar as this is so, this canon, even if its exclusive dominance were assumed, could not fail often to give only conflicting or ambiguous or indeterminate results. And insofar as it gives only such results, and yet is treated as decisive, it is being used as a fiction, or even as a mere ritual to accompany a substantially legislative act.

IX. SPURIOUS ASPECTS OF THE CONTRAST OF "INTENTION" WITH "EFFECTIVENESS".

Multiplicity of versions and indeterminacy of particular canons creates a field of dubious resort to them which is wide enough. But this field is enormously widened when the application of one canon is held (as it often is) to depend upon the applicability or non-applicability of some other canon. Thus Professor Lauterpacht regards as "the cardinal question of interpretation" the relation of the principle of "effectiveness" to the "intention of the parties". Now "the intention of the parties" as that learned author understands it, may extend from the most emphatic, explicit, and unambiguous expression on the precise point, to the most tenuous, indeterminate and problematical "assumption" or "imputation" of intention according to the interpreter's assessment of factors which may, in their turn, include the whole system of international law. He also recognises that "effectiveness" (posed as a standard by the canon) is not absolute effectiveness but a matter of degree, that the choice in the maxim ut res magis valeat quam pereat is not between valeat and pereat, but merely between the degrees to which valeat. Each canon therefore revolves on an indeterminate focus; and to pose in these terms the question, Shall intention contradict what is explained. To express it more concretely, no light that is shed as to the ends sought to be accomplished can contradict the common design which the words of a treaty are employed to register. Yet that light may contradict "natural", "plain", or other kindred meanings that usage has been wont to attach to particular terms.

Cf. Stone, Province, 192ff. See the formulations of this canon by the Permanent Court collected by "Pollux", article cited supra n.45, at 67-68.

Professor Lauterpacht, indeed, has given a version of the context which is even wider. It is, he says, the treaty as a whole which is law, and the treaty as a whole transcends not only its individual provisions but also the sum total of its provisions. It transcends, indeed, even the expression of the intention of the parties. "It is part of international law and must be interpreted against the general background of its rules and principles". (See his "Restrictive Interpretation and the Principle of Effectiveness" (1949) 26 B.Y.B., at 76.) Not, of course, always; but often enough.

It may be added that in a version of the context as wide as the one suggested by Professor Lauterpacht (see supra n.69) even that one version exclusively applied may often yield quite indeterminate results.

Only less indeterminate in result, as we shall see, is the reduction of the plain meaning canon to a search for the intent with which words are used, without limit on the admission of evidence extraneous to the text. See e.g. P. Marshall Brown, article cited supra n.53, 819-824. Contrast the extreme view of the exclusive sanctity of the text, as the basis on which alone States ratify, in A. P. Fachiri, op.cit. supra n.1, at 746, and the corresponding view in private law in F. Pollock, Principles of Contract (9 ed., 1921) 265ff.

"If," he asks (article cited, at 69), "the intention of the parties was that the treaty should not be fully effective — if they intended that its clauses should be limited in their scope and operation — to what extent does it lie with an international tribunal to add to the efficacy of the treaty because of its own conception of international interest or of the purpose of the agreement."

See citation supra pp. 348-9.
or effectiveness prevail? is to pose a question which is unanswerable until those concepts are redefined sufficiently to make clear what precisely is the conflict between them; or until the canon is somehow redefined so as to convert its application into a matter of degree in each particular case.

This would be so even if the res which is to be sustained (valeat) under the maxim of effectiveness were something given and known. In fact that, too, is a concept of multiple versions. Even the simplest of these, which would identify it with the intention of the parties, might furnish no clear guide, since according to some authorities the “intention” may have to be sought by placing the treaty text within the whole framework of international law. Would this version of the res require the effectuation of so far-fetched, and indeed fictitious an “intention”? Or is only real intention to be so effectuated? Another version might identify the res with the treaty itself independently of intention. This would, however, be based on the fallacy of attributing meaning to words per se; for to the extent that the words transcend the parties’ intentions, it is arguable that they are mere words, and the constructive meaning attributed to them in law could scarcely rank as a res within the maxim.

This difficulty might be escaped by still another version which would identify the res with policies extraneous both to the intention and the words of the treaty, for instance, with policies of building efficient international organization, approved by the tribunal. This, indeed, appears to be the notion of effectiveness finally adopted by Professor Lauterpacht when he assumes a conflict between “intention” and “effectiveness.” And, of course, he feels bound in such terms to deny that “effectiveness” can “be allowed to assume an existence independent of the intention, express or legitimately implied of the parties.” Yet this self-denying ordinance itself loses much of its apparent value as a guide when we recollect that the learned writer’s notion of “legitimately implied intention” permits the tribunal to import into a text “a meaning by reference to the paramount principle of the completeness and the rational development of the law and of the requirements of justice in the light of the purpose of the treaty viewed as a whole” — all this, too, against the general background of international law. While, therefore, purporting to strip “effectiveness” of any objectives extraneous to “intention”, he also invests “intention” itself with objectives extraneous to itself, under cover of intentions “imputed” or “implied” by reference to such notions as the “rational development of the law” and to “the requirements of justice”.

X. CONTEMPORARY ASSESSMENTS OF THE ROLE OF THE CANONS IN INTERPRETATION.

Professor Lauterpacht expresses the hope that the “inconclusiveness” of his arguments “will not be attributed solely” to his “indecision” but rather to the “controversial and elusive problems” of the judicial function. The present writer, while agreeing with the characterisation of those problems, feels driven to conclude that such indecision does contribute to the parlous state of this field of thought. Understanding cannot be advanced by insisting, as the learned writer does, that both real intentions of the parties are often not available as

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74 See supra n. 53, and his examples on 70-72, which are only worth discussing on this assumption.
75 Id. at 74.
76 Id. at 82.
a basis of interpretation, and (simultaneously) that the task of interpretation is always to ascertain “intentions” even when there are none, or where they conflict inter partes or are self-contradictory. So, similarly, when we speak of the canon of the context as requiring the Court, in the final resort, to interpret the treaty in the context of the international legal order as a whole,77 clarity requires us to recognise the broad leeways for judicial choice which are inevitably involved. Such leeways are still the more increased if we also insist that the rules of general international law themselves are to be interpreted in the light of “the general principles of law recognised by civilised nations.”78 Though from a formal standpoint such formulae appear to give directives to the courts, nevertheless, for the purpose of any particular decision, the directives are so wide, and the principles to which they point are so disputed, or inchoate, or self-contradictory, that the directives leave a wide field for uninhibited creative choice by the Court.79

To this perplexing situation there have been three main juristic reactions. The most radical reaction is to treat judicial resort to the canons of interpretation as mere ex post facto rationalisation of results reached on other grounds.

Formal maxims do not decide concrete cases; no one of the so-called rules of interpretation is so inexorable that it actually dominates the process of giving a meaning to an instrument. Indeed, it is easy to see that in the application of the familiar canons one is often in competition with another. It is believed that the matter is put in its proper light if it is realised that in the actual order of judicial decision the conclusion is reached before the maxim is invoked. A rule of construction is a way of stating the result rather than a way of arriving at the result. By a subtle process which may take many competing considerations into account, the mind comes to rest at a conclusion which seems proper in the case; it is then recognised that the mode of reasoning falls under one of the accepted rules of construction.80

Such a view reduces the tasks of judicial interpretation in an unwarranted degree to intractable processes and unpredictable conclusions.81 It is, in the present view, not necessary to deny that the intentions of the parties to a treaty can ever be clear and compulsive on the Court, in order to admit that they are not always so. It may be that “interpretation is an act of judgment,

77 See e.g. Professor Lauterpacht’s position, supra pp. 348-49.
79 This, moreover, becomes even clearer when Professor von Verdross draws as a corollary from his position the further principle of interpretation that to ascertain the meaning of a treaty, we must often have resort to “the principles which govern the subject-matter of the treaty.”
80 C. Fairman, op.cit., supra n.26, at 134-35.
81 See the American literature collected in Stone, Province, 410ff. And cf. among civilian writers, Alf Ross, Towards a Realistic Jurisprudence (1946) 150-51: “What has been said here about the necessary purposive character of interpretation of course applies in an even greater degree to the so-called methods of deduction. Whether these are termed formally logical or analogical there will in no case be a logical objective process of cognition, but a motivation determined by practical interests, which will later try to find a rational expression in an “inference”. And see K. Engisch, Die Einheit der Rechtsordnung (1933), who observes that “what is hidden implicitly in the legal order is explicitly developed by legal cognition.” (p.81); that every “objective interpretation” means “something creative: not reproduction but production. To call it interpretation is at least founded on misuse (misbrauchlich) and in any case improper . . . . This conception veils the creative character of the objective interpretation.” The “objective interpretation” of existing law is and remains in part “a supplementing (Ergänzung) of law, in part development of it . . . .” (p.90).

And see for other cognate approaches, the materials collected in M. Schoch (transl.
and the familiar principles cannot reduce the process to a mechanical opera-
tion;" but it does not follow from this that the canons of interpretation must
always be impotent to yield a directive in a particular case.

A second, slightly less radical standpoint, well represented in relation to
interpretation generally by Gustav Radbruch,83 denies any direct control by
the meanings intended by the author of the law over "the objectively valid
meaning of the legal rule."84 The only relation maintained on this view between
the legislator's intention and the meaning attributed by the Court is that the
latter is to be regarded constructively as the intention of the legislator. "It is
therefore," says Professor Radbruch, "possible to determine as the legislative
will what never existed in the conscious wills of the authors of the law . . . .
The law may be wiser than its authors — indeed, it must be wiser than its
authors".85

It is an insoluble (sic) mixture of elements theoretical and practical,
perceptive and creative, reproductive and productive, scientific and
transscientific, objective and subjective. To the extent, however, that the
interpretation is practical, creative, productive, transscientific, it is deter-
mined in each case by changing requirements of law.86

At the other extreme, no contemporary publicist stands squarely on the
position that the Court's task in applying the canons of treaty interpretation
is always one of mechanical application leaving no room for proper variation
of judgment. Professor Lauterpacht's reliance on the intention canon to the
limits of most tenuous implication and construction and the widest contextual
supplementation perhaps approaches at times nearest to such a view. For this
reason and because of his important recent contribution as Rapporteur on
treaty interpretation to the Bath Conference of the Institute of International Law
in 1950,87 his position may here be examined as a whole.

All the resolutions offered by the learned Rapporteur proceed on the
dominance of the "intention" canon; all of them illustrate the high skill with
which what are formally directives can be framed so as to permit (and require)
judicial escape from their formal compulsiveness.

Thus, in the first, which stresses the importance of the natural meaning
in the search for intention, the Rapporteur recognises that this "natural" mean-
ing, however clear, can be misplaced by "contrary proof", presumably
extraneous evidence of the parties' intentions. He poses no limits to this
extraneous proof. In the second resolution, the author would admit resort to
the travaux preparatoires to resolve disputes as to intention, provided the
travaux have been published. No rules are laid down as to conflicts of indication

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82 C. Fairman, op.cit. supra n.26, at 139.
83 Id., at 141.
84 C. Fairman, op.cit. supra n.26, at 139.
85 Legal Philosophy (transl. by K. Wilk.) in 4 Twentieth Century Legal Philosophy
Series (1950) 141-42.
86 Id., at 141.
87 Cf. A. Ross, op.cit. supra n.81, at 150: "... "the lawgiver" as an expression of one
will is a mere fiction'. On the general philosophical question on which the more extreme
negations of the role of will and intention in interpretation can be based, see A. Hagerstrom,
op.cit.supra n.51a, esp. at 11, 15, 17-55.
88 At 142.
89 (1950) 43 Annuaire 366-460, esp. 433-34.
from the *travaux*, from the “plain” meaning, and from extraneous evidence of intention. Where there are such conflicts, the directives are scarcely compelling. In a third resolution the Rapporteur is concerned to record the “insignificant role in practice” of the restrictive canon. This, the author would limit in application to “the extreme case when every other means of establishing the parties’ intention failed.” This comes nearest to a substantial directive of a compelling nature. But even if this could be established *de lege lata*, the compulsiveness would be in part illusory, since wide variations of judgment are usually possible as to whether “all other means of establishing intention” have indeed failed.

The fourth resolution stresses that considerations of good faith and the effectuation of the objects of a treaty base the canon of effectiveness (or “extensive interpretation”). This canon, says the Rapporteur, is a legitimate and sound guide “insofar as a clear indication of the contrary intention of the parties does not exclude its use”. Obviously, the appreciation whether there is such a contrary intention is one permitting variation of judgment. Moreover, as the author himself goes on to say, we must bear in mind that the parties themselves may not have intended to give full efficacy to their treaty provisions. It results, therefore, that however clearly the purpose of the provision may appear from a treaty text, the canon of effectiveness may still not require its fuller implementation. For the Court may conclude either from the *travaux* or from other extraneous evidence, that the parties did not intend fully to effectuate that purpose. The present writer has himself stressed this point, which affects some of the central and burning problems of the United Nations Charter.88 Once it is admitted, it follows that the task of treaty interpretation leaves to the court a certain freedom to depart, not merely from the “natural meaning” of the words used, but from the clear “purpose” of the treaty as a whole. Be this freedom large or small, it derogates from the assumed compulsiveness of the canons.

Finally, the fifth resolution admits that there may be “an absence of any real intention of the parties,” and that in such a case it falls to the competent international organs, judicial or arbitral, to fill the gaps and resolve the divergencies conformably to “the fundamental exigencies of the completeness of the legal system (la plenitude du droit) and of international justice.”89 It must be obvious that a court directed to choose between possible meanings on the basis of “la plenitude du droit et de la justice internationale” is not compelled by any legal directive to any single conclusion.

Yet, when Professor Lauterpacht has inquired whether his view, that the Courts must interpret according to the parties’ intentions, also requires recognition of its freedom to give effect to its views of “policy” when no such actual intentions are expressed, he has always fallen back on equivocation or foreshortened analysis.90 To say, as he has done, that law-creation by the interpreter is permissible “only on condition that the judge does not consciously

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89 (1950) 43 *Annuaire* at 434.
90 Cf. L. Ehrlich, op.cit. supra n.3, at 131, who points out precisely that where “constructive” intention is resorted to, the decisive factors in the court’s mind must be considerations of policy. He attempts a preliminary systematisation of these according to whether they concern the interests of (1) individuals; or (2) States; or (3) of “international solidarity”.

This final freedom of choice cannot be concealed by merely invoking, as if they were legal norms, various symbols of ethicopolitical evaluation, such as “the principle of solidarity” or of “international justice” (see e.g. G. Salvioni (1950) 43 *Annuaire* at 455); or, for that matter, of “la plénitude du droit et de la justice internationale” (see e.g. H. Lauterpacht, Draft Resolution V, in (1950) 43 *Annuaire* 434).
and deliberately usurp the function of legislation”,\textsuperscript{91} is merely to reiterate the question under cover of answering it. For when is this judicial assumption of power a “usurpation” rather than a duty? To add that canons of interpretation such as that of effectiveness “can give life and vigour to an intention which is controversial, hesitant or obscure”, but cannot be a “substitute for intention”, is but to bolster a circuitry by a half-truth.\textsuperscript{92} Professor Lauterpacht’s final refusal to face the consequences of his own analysis is the more striking in the light of his flashes of recognition elsewhere, some as recently as 1949, that as a rule the traditional canons of interpretation “are not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means.”\textsuperscript{93}

This state of the literature presents the science of international law with an unacceptable choice. Must juristic science be content, at this day and age, to choose between, on the one hand, an iconoclasm, which denies all certainty and predictability in the judicial interpretation of treaties, and, on the other hand, an admission of the limited role of the canons of interpretation accompanied by a denial of the consequences of that admission? Fuller understanding of these difficulties calls for some remarks from the standpoint of the sociology of international law.

\textit{XI. JUDICIAL CREATIVENESS IN THE INTERPRETATION OF TREATIES}

The factors which, in the municipal field, inhibited recognition of the judicial duty of \textit{libre recherche scientifique}, even in areas of interpretation where a real legislative intention is lacking, are clear enough, and have long been exposed. The fear of provoking executive or legislative jealousy of judicial power, and consequent political attacks on judicial integrity; the fear of excessive strain on the capacity and integrity of judges where the discipline of rules is lacking; the logical repugnance of judicial lawmaking to the abstract dogma of the separation of powers—all of these, as well as faulty analysis and sheer misunderstanding—played their part. Yet, the exercise of the power went on, even when its existence was fervently repudiated. The result of the inhibitions was not to inhibit the power, but rather to inhibit the growth, in those who exercised it, of commensurate awareness of responsibility. And the eras of Ihering, Geny, Ehrlich and Kantorowicz on the Continent, of Gray, Holmes, Pound, Cardozo and Brandeis in America, and of Lord Wright in England, finally secured a wide (though not even now a universal) acknowledgement of the realities in municipal systems.

In the international sphere the factors inhibiting recognition of the realities are no less formidable; but the scientific examination of them has hardly begun. Foremost, beyond doubt, is the concept of international law, now

\textsuperscript{91}H. Lauterpacht, article cited supra n.69, at 83. The introduction of the adverbs “consciously and deliberately” to qualify “usurp” seems unrelated to the main issues in the present debate.

\textsuperscript{92}Since it implies either (1) that the parties must have some common intention on the instant point, when clearly they may not have; or (2) that when such intention is lacking, the interpreter must utter a \textit{non possumus}, and the parties be met with a \textit{non liquet}, neither of which implications that writer would accept.

\textsuperscript{93}Article cited supra n.1, at 53, a view coming very near the quite radical position of C. Fairman, \textit{supra} pp. 360-61. And see the convincing consequential argument, \textit{ibid.} 53-55, that this branch of the law leaves a wide discretion to the Court as to the means of reaching a desired result.

\textit{Cf.} a similar straddling attitude recently in C. Eagleton, article cited \textit{supra} n.49, at 129. While stressing that there is a difference between interpretation and development on the one hand, and disregard and neglect of law on the other, he does not really attempt to delimit them.
generally dominant, as resting for its validity on the consent of sovereign States. From this standpoint, fictions resorted to in the interpretation of treaties play the role of a conceptual bridge between the self-assertion of sovereign States and those real drives to ordered social living of which even the most sovereign of States must be conscious. To a certain extent, therefore, the hesitation of judges, publicists and statesmen to acknowledge judicial law-creation is a function of political wilfulness; but not wholly so. For it is also true, in the second place, that we still lack international tribunals which can reflect the socio-ethical convictions of the aggregate of States, in a manner corresponding to that in which municipal judges reflect the convictions of a nation. And it is this relation between judges and community which, in the final resort, renders judicial law-creation tolerable and consistent with liberty.

Moreover, in the third place, conscious recognition of the law-creating function would make demands on publicists and judges transcending the limits of their expertise, plunging them finally into realms of ethics and metaphysics that may well daunt both tribunals and those who argue before them and comment upon their work. It is, fourthly, an obvious international policy not to discourage submission of States to third party judgments by any display of judicial power going patently beyond the mere application of accepted customary and treaty rules.

Yet, when all these explanations are made, it still remains true that to conceal creative power by fictions does not prevent its actual exercise; nor can it remove the necessity for its exercise. In this situation canons of treaty interpretation have served certain practical purposes, even where they were not capable of compelling one single meaning. They have, in the first place, served as captions under which the tribunal could marshal existing precedents, so as to afford a general indication of relevant factors. They have, in the second place, given to tribunals a sense of continuity of tradition, relieving the psychological loneliness inseparable from the responsibility of policy-making. They have, in the third place, given some support (though often quite illusory support), to the claim of tribunals that their reasoning and the decisions arrived at had an objective validity even before they reached them, and have thus lightened the felt burden of responsibility. The first of these roles seems unexceptionable. The second, though involving illusory elements, need not necessarily lead to deviation from the duties nor escape from the responsibilities of judgment. These evils, however, do seem inseparable from the use of the canons to produce the appearance of an objective decision based on compulsive legal directives, where in reality no legal compulsion does exist.

Insofar as the various canons all claim the standing of law, and yet often conflict in their directives, they can only give effective guidance on the assumption that some superior rule resolves such conflicts. Such a superior rule might directly allot priority as between the conflicting canons; but neither practice nor doctrine seem to establish any such hierarchy. Insofar as the conflict is not
resolved by such a rule of hierarchy, it must be resolved by the Court’s determination in each case. This is but another way of exhibiting the creative aspects which interpretation may have, even when the Court uses the canons as far as it can. And the important role in interpretation given to the principles of “good faith” and “justice”, is a clear recognition of this fact: there is no harm in calling these “canons”, provided that this does not conceal the freedom which their wide indeterminacy leaves to the Court.

Recognition of these realities, too, is quite consistent with the general recognition that decisions of international tribunals are themselves a main source of international law. To recognise them, moreover, does not require us to say that tribunals act at large; absence of legal constraint is not synonymous with Willkuer. And to a certain extent, the traditional canons, though not compelling particular decisions, can serve as rules of prudence reminding the tribunal of the complexity of its task, and the need to embrace the full range of relevant considerations before making a final choice.

Not all the canons, indeed, are equally well adapted to this end, at any rate in their traditional versions. The plain terms canon, for example, is best seen for this purpose as expressing the simple truth that one cannot walk without first taking a step, even though that first step may not determine the final direction of travel. So, too, the canon concerning the travaux preparatoires requires some extension as well as some restriction as compared to its ordinary version. On the one hand, the preparatory materials which may be relevant to the meaning of an international treaty are actually everything that has influenced the creation and the contents of this treaty, that is, the whole socio-political context from which it arose. On the other hand, as Sir Eric Beckett has recently stressed, travaux preparatoires can never claim as such to control the final meaning of the treaty independently of that context, and of the Court’s evaluation of the choices before it, in relation to the Parties’ future obligations.

Yet, when all the guidance possible has been culled from the canons, the Court will in many cases still not have arrived at a point where only one path lies ahead to the one legal meaning of the treaty. Even those, indeed, who are concerned to champion the claim of full judicial objectivity, can only make the claim plausible by including among the canons such categories of logically indeterminate reference as “international solidarity” or the principles of “good faith” and of “justice”. Such invocations obliquely recognise the present point that an adequate theory of interpretation of treaties must acknowledge that even under the accepted canons the Court may have to make ethico-political choices before reaching a legal decision. What name we give to the ethico-political norms resorted to is not here the main question; justice and its criteria at least, as they are understood in legal systems generally, are here involved.

It is recognised that there is no superior rule of hierarchy as between the canons, these ‘can only be integrated into the international legal order by being treated as limbs of a complex norm of disjunctive structure rather as follows: the international judge ought to interpret treaties according to the canons, C1, C2, C3, . . . , Cn. Even in this form it would be impossible to give the canons their definitive legal content, since it is by no means clear that the total of the canons thus far recognised exhaust the possibilities. I am much indebted to my colleague Dr. I. Tammelo for this suggestion.

See e.g. as to the principle of good faith, H. Kraus, in (1950) 43 Annuaire 445; and as to the principle of justice, G. Salvioli, id. at 455, and Professor Laüterpacht’s agreement therewith id. at 460.

See supra p. 351.

On the relation between logical indeterminacy of argument to judicial creation, see
Yet the tasks of doing justice without or beyond the law are vastly more difficult for the international than for the municipal judge. This is so despite the constant appeal to "justice" of publicists and diplomats; and this for at least three reasons, arising respectively from the nature of justice, from the state of international law, and from the state of international society.

Justice, itself, in the first place, is not only an indeterminate concept; it is also intellectually speaking an empty one. For it to serve as an intellectual instrument, justice must have its criteria. Such criteria may differ widely from person to person and even in the same person from moment to moment; but in societies which are well-integrated in common experience social criteria of justice can emerge of pronounced stability based on socio-ethical pressures, and providing in turn a stable basis for the going legal system. International law itself cannot as it stands be said to be based on the socio-ethical convictions of any existing international society. Nor is there any existing international society upon whose socio-ethical convictions it is as yet possible to build a "just" system of international law. The deep and far-reaching ideological conflicts which divide modern States are reflected in conflicting socio-ethical convictions which can produce only mutual incompatibility of criteria of justice as between great segments of mankind. Moreover, the clash of contradictory Weltanschauungen, to which modern technological weapons and mass communication have been harnessed, has produced a general confusion and dimming even in the criteria of justice held by individuals, destroying them or rendering them incommunicable, and therefore impotent, to aid in the growth of new group conviction.

In such a situation the antinomies innate in the principle of justice show themselves in a glaring light. The antinomy of summum ius summa iniuria and fiat iustitia pereat mundus, for instance, points to perils in the international field so dire that even an international judge who is vir iustissimus, perfectly conscious that where the law falls short he must still do justice, and perfectly endowed with knowledge of the criterial of justice to be applied, may well, in certain situations, hesitate to apply them. He may well feel constrained from adventuring much with justice whenever this would, in a world armed with weapons of mass destruction, create an immediate threat to the survival of mankind. In such a world even justice may have to wait until mankind can survive the doing of it; mercy, also, is a quality of the perfect judge.

Of course, the resort to justice necessary in the course of interpreting a particular treaty will but rarely raise such dire possibilities. But whether or not it does so, the reality of judicial choice and therefore of judicial creativeness generally Stone, Province, 189ff.

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103 See R. Pound, Outlines of Jurisprudence (5 ed. 1943) p. 87 ff.
104 See for a fuller discussion of some of these difficulties, Stone, Legal Controls, 133-164.
105 Not of course emotionally speaking. The emotive drive to justice — or against justice — seems prior to any particular intellectual content of the notion. See the general thesis of E. N. Cahn, The Sense of Injustice (1949).
106 See Stone, Province, 211.
107 On socio-ethical pressure and its relation to the criteria of justice, see Stone Province, cxxvi and pp. 776-785.
108 It is very questionable whether even Lauterpaécht and Salvioli, who both emphasised the importance of the principle of justice for the interpretation of international treaties, conceived of justice in the same sense. See references supra n.99.
110a For recent observations by a distinguished President of the International Court of Justice on the necessarily limited role of the existing court in relation to the preservation of peace, see the concluding pages of A. D. McNair, The Development of International Justice (1954).
in many important cases, remains. And, wherever this is so, the process of judgment will involve not merely the judicial intellect, but the judicial will, not merely the mind but the emotion, not merely the function of cognition, but the function of volition.\textsuperscript{110} The important question is whether the tribunal will choose more wisely if it chooses in consciousness of its responsibility rather than in the belief that it has no choice open. This is a question on which there may be divergent views even in the municipal administration of justice.\textsuperscript{111} And it must be acknowledged at the very outset that the case for continuing to "make-believe" that the field of judicial freedom does not exist is very strong on the international level — much stronger certainly than on the municipal level.

On the one hand, the international judiciary has not yet achieved that institutional stability which has in many municipal societies permitted judges to assume openly and with impunity the role of final reviewing authority of the common weal.\textsuperscript{112} On the other hand, even if the international judiciary did enjoy adequate stability for this purpose, it is most hazardous to assume that they could make such a conscious contribution to the elucidation of the value-system of international justice as would be seriously comparable to that made by judges on the municipal level. And this, not because of any inferiority of their calibre, but because (as already observed) the international community does not as yet offer adequate socio-ethical foundations. There is room, therefore, for the view that the fictions which combine to conceal judicial creativity in international law serve the proper social function of protecting the growing judicial arm against premature strains. At worst such strains might destroy the judiciary altogether; at best they might clarify but little those basic problems of international policy and justice which must mature in common experience before they can be expressed through judicial insight.

The Writer must, therefore, leave open the practical import of the present analysis for the international judicial process in treaty interpretation. The results of the analysis remain nevertheless of capital importance on the intellectual level. Their recognition may permit some clarification of the painful confusions and contradictions of prevailing doctrine. Moreover, such recognition seems to be indispensable if understanding of this field of international law and its institutions is to advance further. Finally, the persistence of publicists in denying the creative element in the interpretation of treaties, even when their own analysis clearly displays this element, may thus be seen in a new light. This very contradiction may be an oblique\textsuperscript{113} reflection of the dramatic

\textsuperscript{110} Cf. F. Schreier, \textit{op.cit. supra} n.4; P. Guggenheim, \textit{1 op.cit. supra} n.10, at 124.

\textsuperscript{111} See Stone, \textit{Province}, 590ff.

\textsuperscript{112} As does the Supreme Court of the United States on many matters.

\textsuperscript{113} It has perhaps come nearest articulation in Professor Lauterpacht's work, and certainly explains aspects of that distinguished writer's positions, which seem quite incomprehensible on the merely intellectual level. See esp. his "Some Observations on Preparatory Work ..." (1935) 48 Harv. L.R. 549, esp. 573ff. Pleading for greater resort to the "intention" canon, as opposed to the "plain meaning" canon (grammatical or logical interpretation), he argues that resort to the plain meaning, since it involves greater judicial responsibility, is only open "in a society where the position of the judiciary is traditionally a strong one" (574). In his view the weakness of the international judiciary makes it preferable on the international level to stress the more flexible intention canon, for this would "diminish the burden placed upon the international judge" (575). As we have seen (\textit{supra} pp. 347-350) that writer's version of the intention canon is the richest in fictions, such as his various sub-canons of constructive intention, concealing the necessity of judicial law creation; and his wide versions of "the context" add further "flexibility" to the process of "finding" the intention.

\textit{Cf.} the recognition of the element of fiction in these devices in L. Ehrlich, \textit{op.cit.supra} n.3, at 67, who speaks of some of them as "fictions serving ... to establish what one could regard as the intention".
conflict here traced, between the necessity of creative judicial choice, and the factors inhibiting conscious acceptance by international judges of the responsibility which such choice implies.\textsuperscript{114}

\textsuperscript{114} So also the inconclusive results of two sessions of distinguished discussions by the Institute of International Law in 1950, and 1952 (see supra nn.6, 7, 7a and passim), may reflect these deeper functional and policy conflicts within the international community, rather than mere verbal and technical disagreements among the publicists.